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DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING DOCAVE
COMPUTER SOFTWARE

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (“CBP”) has issued a final determination concerning the country of origin of certain computer software known as DocAve Software. Based upon the facts presented, CBP has concluded that the software build operations performed in the United States substantially transform software modules developed in China. Therefore, the country of origin of DocAve Software is the United States for purposes of U.S. Government procurement.

DATE: The final determination was issued on December 4, 2013. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR § 177.22(d), may seek judicial review of this final determination on or before [insert 30 days from date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Valuation and Special Programs Branch: (202) 325-0034.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on December 4, 2013, pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 CFR Part 177, subpart B), CBP issued a final determination concerning the country of origin of certain computer software known as DocAve Software, which

may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H243606, was issued under procedures set forth at 19 CFR Part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511–18). In the final determination, CBP concluded that, based upon the facts presented, the software build operations performed in the United States substantially transform non-TAA country software modules developed in China. Therefore, the country of origin of DocAve Software is the United States for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR § 177.29), provides that a notice of final determination shall be published in the *Federal Register* within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR § 177.30), provides that any party-at-interest, as defined in 19 CFR § 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the *Federal Register*.

DATED: December 4, 2013

Sandra L. Bell
Executive Director
Regulations and Rulings
Office of International Trade

Attachment

HQ H243606

December 4, 2013

Larry Hampel, Esq.

Albert B. Krachman, Esq.
 Blank Rome, LLP
 Watergate
 600 New Hampshire Avenue, NW
 Washington, DC 20037

RE: Trade Agreements Act; Substantial Transformation; Country of Origin of Software

Dear Mr. Hampel and Mr. Krachman:

This is in response to your letter dated June 24, 2013, requesting a final determination on behalf of AvePoint, Inc. ("AvePoint"), pursuant to subpart B of part 177 of the U.S. Customs and Border Protection (CBP) Regulations (19 C.F.R. Part 177). Under these regulations, which implement Title III of the Trade Agreements Act of 1979 (TAA), as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of computer software. As the U.S. importer of the subject merchandise, AvePoint is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination.

FACTS:

AvePoint manufactures DocAve Software ("DocAve"), a comprehensive suite of applications for Microsoft® SharePoint®. SharePoint is a multipurpose set of Web technologies backed by a common technical infrastructure that is used to provide intranet portals, document & file management, collaboration, social networks, extranets, websites, enterprise search, and business intelligence. It also has system integration, process integration, and workflow automation capabilities. DocAve products simplify the deployment, monitoring, and enforcement of SharePoint governance policies. DocAve products have a browser-based user interface and a fully distributed architecture that integrates backup, administration and data management technologies for all SharePoint products. Its applications can be executed separately, but they function within a unified platform and are provided as an integrated package.

According to the information submitted, DocAve software is developed in seven steps, described as follows:

- (1) **Research:** A list of ideas and potential features to be included in the software is compiled. A product roadmap is developed and test cases are written to govern and ensure that all the requirements of the application and software design are met. Twenty percent of total product development hours is allocated to this step (18% of which is performed in the U.S. and 2% in China).

- (2) **Development of Graphic User Interface (“GUI”):** A prototype GUI based on designs created in Step 1 is developed and tested. Ten percent of total product development hours is allocated to this step, all of which is performed in the U.S.
- (3) **Development/Writing of Software Specifications and Architecture:** The chief architects create a detailed software design in order to modularize the software so that its development can be easily distributed and managed by different development teams. Ten percent of total product development hours is allocated to this step, all of which is performed in the U.S.
- (4) **Programming of Source Code:** Software modules are distributed to different development teams in the U.S. and China. Each module is self-contained and can be developed separately, but cannot run independently and is not executable code. Twenty-five percent of total product development hours is allocated to this step (5% of which is performed in the U.S. and 20% in China).
- (5) **Software Build:** Separate source code modules are transferred to the repository server hosted in the U.S., which is the only place where a development team has access to the entire source code. The team integrates the modules with each other by compiling the source code into object code (a sequence of statements or instructions in a computer language) and works out incompatibilities or bugs by re-writing or correcting source code, as needed, makes the software into executable files, and constructs an installation package that is easily installed. The U.S. team creates all the lines of the object code, makes all the software executable files in various versions and languages. This step may be performed multiple times if testing indicates the need for correction. Fifteen percent of total product development hours is allocated to this step, all of which is performed in the U.S.
- (6) **Testing and Validation:** The software package is tested based on functional specifications defined in Step 1. Once the test case pass rate is met, the software is ready for release. Fifteen percent of total product development hours is allocated to this step (5% of which is performed in the U.S. and 10% in China).
- (7) **Preparing Software/Burning Media for Distribution:** The U.S. project management team coordinates with marketing and sales teams to make the software publicly available. Five percent of total product development hours is allocated to this step, all of which is performed in the U.S.

In sum, steps 2, 3, 5, and 7 (development of the GUI, development/writing of specification and architecture software, software build, and preparation of software for distribution) are performed entirely in the U.S. Steps 1, 4, and 6 (research, programming of the source code, and testing and validation) are performed in the U.S. and China. In terms of total product development hours, which encompass all seven steps, 68% is allocated to work performed in the United States, and 32% to work performed in China. We note that there were no documents submitted in support of the estimated percentages of work hours involved in the overall manufacturing process. For the purposes of this ruling, we presume that the figures provided are correct.

ISSUE:

What is the country of origin of AvePoint's DocAve Software for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

Pursuant to Subpart B of Part 177, 19 CFR § 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. See 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Procurement Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. See 48 C.F.R. § 25.403(c)(1). The Federal Procurement Regulations define "U.S.-made end product" as:

[A]n article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

In Data General v. United States, 4 Ct. Int'l Trade 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States (predecessor to subheading 9802.00.80, Harmonized Tariff Schedule of the United States), the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. The PROMs had no capacity to store and retrieve information until they were programmed in the U.S. by U.S. engineers who interconnected the discrete components in a defined logical pattern. The programming bestowed upon each circuit its electronic function, that is, its "memory" which could be retrieved. A distinct physical change was effected in the PROM

by the opening or closing of the fuses, depending on the method of programming. This physical alteration, not visible to the naked eye, could be discerned by electronic testing of the PROM. The court noted that the programs were designed by a U.S. project engineer with many years of experience in “designing and building hardware.” While replicating the program pattern from a “master” PROM may be a quick one-step process, the development of the pattern and the production of the “master” PROM required much time and expertise. The court noted that it was undisputed that programming altered the character of a PROM. The essence of the article, its interconnections or stored memory, was established by programming. The court concluded that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device, possessing a desired distinctive circuit pattern, was no less a “substantial transformation” than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern.

You believe that the country of origin of DocAve Software is the United States because it is the country in which the software build occurs, a process which you liken to assembly and believe is sufficient in itself to effect a substantial transformation of all the software inputs. You note that some of the pre-build design and architecture, and some of the post- or re-build test design and validation decisions also take place in the U.S. Specifically, the design concept and user-driven features of the software are the result of work performed in the U.S., and their functional implementation is achieved only through the compilation of source code modules and the integration of executable modules through numerous build and test sequences, also performed in the U.S. Additionally, you note that while testing is largely performed in China, the decisions on critical functions and features pass rates are taken by the U.S. project management team. As a result of the software development and production processes performed in the U.S., you believe that a new commercial product (DocAve Software) is created that differs from any of its components, which individually are not capable of achieving the purpose or function of the completed software.

Based on the reasoning in Data General supra, we find that the software build performed in the U.S. substantially transforms the software modules developed in China and the U.S. into a new article with a new name, character and use, that is, DocAve Software. During the software build process, the source code modules developed in the U.S. and China are transferred to a server in the U.S, where the U.S. software development team creates DocAve Software by compiling the source code into object code, and works out incompatibilities or bugs by re-writing or correcting source code as needed. Moreover, the U.S. team creates all the lines of the object code, makes all the software executable files in various versions and languages, and constructs the installation package as an easily installable unit. In addition, 90% of the software development research is performed in the U.S., as are aspects of programming of the source code and testing and validation, such that 68% of the development of DocAve Software is attributed to work performed in the United States. Given these facts, we find that the country of origin of DocAve Software is the United States for purposed of U.S. Government procurement.

Please be advised that whether the software may be marked “Made in the U.S.A.” or with similar words, is an issue under the authority of the Federal Trade Commission

(“FTC”). We suggest that you contact the FTC, Division of Enforcement, 6th and Pennsylvania Avenue, NW, Washington, DC 20508, on the propriety of markings indicating that articles are made in the United States.

HOLDING:

Based on the facts provided, the software build operations performed in the United States substantially transforms the software modules developed in China and the U.S. into a new article with a new name, character and use, that is, DocAve Software. As such, DocAve Software is considered a product of the United States for purposes of U.S. Government procurement.

Notice of this final determination will be given in the Federal Register, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell, Executive Director
Regulations and Rulings
Office of International Trade